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2008

# The Human Dignity of Clients

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## Publication Information

93 Cornell Law Review 1343 (2008)

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## Repository Citation

Kruse, Kate, "The Human Dignity of Clients" (2008). *Faculty Scholarship*. Paper 400.  
<http://open.mitchellhamline.edu/facsch/400>

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# The Human Dignity of Clients

## **Abstract**

This essay reviews David Luban's forthcoming book, *Legal Ethics and Human Dignity*. At the heart of this new book is an argument that interactions between lawyers and clients ought to be at the center of jurisprudential inquiry. Pointing out that most cases do not go to trial and that much transactional work occurs outside the litigation context, he argues that law's defining moments occur when a "client sketches out a problem and a lawyer tenders advice," rather than when a judge decides a litigant's case. This review essay examines how Luban might elaborate a new "jurisprudence of lawyering" by examining the unresolved tension that has always existed between the strong deference to client values in his writing on lawyer paternalism and the "moral activist" vision of lawyering that he has proposed in response to the problem of overzealous partisanship. The human dignity framework he introduces in this volume holds out the promise of integrating respect for client values with attention to the public good. However, I argue, to fulfill this promise would require Luban to move away from the perspective of lawyers as "lawmakers" that he highlights as a jurisprudence of lawyering and contemplate the value and legitimacy of lawyers' partisan interpretation of the law in transactional as well as litigation settings.

## **Keywords**

Attorney and client, Dignity, Legal ethics

## **Disciplines**

Jurisprudence | Legal Ethics and Professional Responsibility

## ESSAY

### THE HUMAN DIGNITY OF CLIENTS

Katherine R. Kruse†

David Luban is a giant in legal ethics. His 1983 collection of essays, *The Good Lawyer*, was instrumental in formulating the theoretical framework of what was then an emerging field of legal ethics.<sup>1</sup> In *Legal Ethics and Human Dignity*,<sup>2</sup> a new volume of essays published twenty-five years later, Luban employs his characteristic blend of analysis, insight, and grace to push theoretical legal ethics into new frontiers that draw on jurisprudential theory, social psychology, and a unifying theme of human dignity.

The heart of *Legal Ethics and Human Dignity* is an argument that interactions between lawyers and clients ought to be at the center of jurisprudential inquiry.<sup>3</sup> Drawing on the work of law-and-society scholars, Luban argues that “the law” is located in the places where it is implemented and that the “lawyer-client consultation is the primary point of intersection between ‘The Law’ and the people it governs.”<sup>4</sup> The jurisprudential obsession with the task of adjudication, Luban posits, has more to do with the “curriculum and attitudes of law school” than with a considered view of where the important jurisprudential questions lie.<sup>5</sup> Pointing out that most cases do not go to trial and that much transactional work occurs outside the litigation context,<sup>6</sup> he argues that the law’s defining moments occur when a “client sketches out a problem and a lawyer tenders advice,”<sup>7</sup> and not when a judge decides a litigant’s case.

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<sup>1</sup> THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS (David Luban ed., 1983).

<sup>2</sup> DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007) [hereinafter LUBAN, LEGAL ETHICS AND HUMAN DIGNITY].

<sup>3</sup> DAVID LUBAN, *A Different Nightmare and a Different Dream*, in LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 2, at 131 [hereinafter LUBAN, *Nightmare and Dream*] (arguing that lawyers are central to the American legal system and, as such, their ethical treatment of their clientele is critical for the system’s legitimacy).

<sup>4</sup> *Id.* at 131.

<sup>5</sup> *Id.* at 132.

<sup>6</sup> *Id.* at 147–52.

<sup>7</sup> *Id.* at 152.

Following H.L.A. Hart, Luban suggests that a jurisprudence of lawyering has its own Nightmare and Noble Dream: lawyers can either wield their professional expertise willfully to subvert their responsibilities or use it to fulfill the highest aspirations of their craft.<sup>8</sup> According to Luban, the Nightmare of lawyering jurisprudence has at least two versions. In one version, lawyers who are "economically dependent on their clients or in some cases ideologically aligned with them . . . spin the law to support whatever the client wishes to do."<sup>9</sup> In the second, lawyers "dominate and manipulate [their] clients, either to advance their own agenda or to line their own pockets."<sup>10</sup>

Many of the remaining essays in the book elaborate the first version of the Nightmare—that of overzealous partisanship. An opening chapter reprieves Luban's famous critique of the "adversary system excuse" for excessive zeal in adversary litigation.<sup>11</sup> Another chapter is an elaborate case study detailing how government lawyers in the Bush Administration produced internal memoranda that condoned the torture of enemy combatants by stretching the law beyond recognition.<sup>12</sup> A trilogy of chapters explores the psychological pressures that lead to unethical behavior in large bureaucratic law firms: contrived ignorance,<sup>13</sup> wrongful obedience,<sup>14</sup> and the "low road" to personal integrity arrived at by adjusting one's beliefs to rationalize behavior that runs counter to one's values.<sup>15</sup>

Luban devotes less attention to the second version of the Nightmare, in which lawyers "dominate and manipulate clients, either to advance their own agenda or to line their own pockets."<sup>16</sup> Although he has not written as extensively about the problem of lawyer paternalism, Luban's early article on the subject remains one of the

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<sup>8</sup> *Id.* at 132.

<sup>9</sup> *Id.* at 159.

<sup>10</sup> *Id.* at 159.

<sup>11</sup> See DAVID LUBAN, *The Adversary System Excuse*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 19 [hereinafter LUBAN, *Adversary System Excuse*] (arguing that the adversary system does not excuse lawyers from exercising ordinary moral obligations that conflict with their professional duties to their clients).

<sup>12</sup> See DAVID LUBAN, *The Torture Lawyers of Washington*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 162 [hereinafter LUBAN, *Torture Lawyers*] (arguing that the lawyers who drafted the Torture Memos violated their ethical obligations by distorting the law to accommodate their client's wishes rather than providing unbiased legal advice).

<sup>13</sup> See DAVID LUBAN, *Contrived Ignorance*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 209 (discussing lawyers' use of willful ignorance to satisfy ethical requirements against knowingly presenting false arguments).

<sup>14</sup> See DAVID LUBAN, *The Ethics of Wrongful Obedience*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 237 (discussing the psychology of obedience to authority figures and its implications for the legal profession).

<sup>15</sup> See DAVID LUBAN, *Integrity: Its Causes and Cures*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 267 (discussing strategies to ensure that individuals' conduct conforms to their moral beliefs).

<sup>16</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 159.

best analyses of the complexity of the sometimes-competing goals of protecting a client's legal interests and honoring the client's values.<sup>17</sup> In this volume, he returns to the subject, using the defense of Unabomber Theodore Kaczynski as one example of how lawyers assault human dignity by ignoring, manipulating, and ultimately silencing their clients.<sup>18</sup> Luban continues to take a strong view that lawyers should respect the client's deepest values and commitments, even when doing so runs counter to the client's legal interests. However, he now frames the issue in terms of protecting clients' human dignity rather than their autonomy.<sup>19</sup>

There has always been an unresolved tension between the strong deference to client values in Luban's writing on lawyer paternalism and the "moral activist" vision of lawyering that he has proposed in response to the problem of overzealous partisanship. Moral activist lawyers consciously seek to shape their clients' objectives and "influence the client for the better" when the lawyer "disagrees with the morality or justice of a client's ends."<sup>20</sup> The methods endorsed in Luban's moral activist client counseling range from the relatively benign, such as appealing to clients' consciences and inventing alternative ways for clients to satisfy their interests without harming others, to more intrusive tactics like manipulating clients to believe that they will be harmed by an immoral course of action (even if this is not true), refusing to follow the client's instructions, threatening to withdraw, and, if all else fails, betraying the client.<sup>21</sup> Such tactics are inconsistent with Luban's arguments against lawyer paternalism that the client's values and commitments deserve recognition even if the values are only minimally rational,<sup>22</sup> and even if the cares and commitments are "detestable or pathetic."<sup>23</sup>

Although Luban has never attempted to reconcile these divergent strains in his scholarship, the human dignity framework he introduces in this volume holds out the promise of a Noble Dream that

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<sup>17</sup> David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981) [hereinafter Luban, *Paternalism*].

<sup>18</sup> See DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 76, 76-79 [hereinafter LUBAN, *Upholders of Human Dignity*].

<sup>19</sup> *Id.* at 74-76.

<sup>20</sup> See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 160 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*]; see also David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004 (1990) [hereinafter Luban, *Lawyer-Client Relationship*]; David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717 (1988) [hereinafter Luban, *Noblesse Oblige Tradition*].

<sup>21</sup> LUBAN, *LAWYERS AND JUSTICE*, *supra* note 20, at 173-74; Luban, *Noblesse Oblige Tradition*, *supra* note 20, at 737-38.

<sup>22</sup> Luban, *Paternalism*, *supra* note 17, at 489-90.

<sup>23</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 88.

would integrate respect for client values with attention to the public good. At the core of his analysis of human dignity, Luban presents a constructive vision of partisan advocacy grounded in recognizing and honoring the clients' perspective on the world—what he calls the clients' "subjectivity."<sup>24</sup> Acknowledging the subjectivity of others springs from the same roots of relational morality as Luban's early versions of "moral activism," in which lawyers retain a moral duty to deviate from professional role morality to respond to the harm that zealous partisan advocacy would work on third parties.<sup>25</sup>

However, the relational morality at the heart of Luban's human dignity framework faces two problems as an integrative framework for his emerging jurisprudence of lawyering. First, it is unclear how lawyers are to resolve conflicts when upholding the client's human dignity by giving voice to the client's subjectivity amounts to an assault on the human dignity of another. I explore this kind of conflict by examining how Luban's human dignity framework might apply to a particularly hard case with which he struggled in his earlier writings: the ethics of criminal defense attorneys cross-examining complainants in rape cases.

Second, it is unclear how the human dignity framework, which focuses on the litigation-based concept of "telling the client's story,"<sup>26</sup> would translate into the transactional context that Luban favors for his emerging jurisprudence of lawyering. He suggests—in a way that he describes as "continuous" with his earlier vision of moral activism<sup>27</sup>—that lawyers fulfilling the Noble Dream will act as "independent intermediaries between private and public interests, translating client problems into the terms of the law, and presenting the law to the client in intelligible form."<sup>28</sup> Following his analysis of the jurisprudential work of Lon Fuller, we might expect lawyers fulfilling this Noble Dream to envision their interactions with clients as a form of "lawmaking" with duties of interpretive fidelity to the internal morality of law.<sup>29</sup> Yet, the jurisprudential role of lawyers as lawmakers is difficult to reconcile with Luban's notion of upholding the human dignity of clients by "telling the client's story and interpreting the law from the client's viewpoint."<sup>30</sup>

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<sup>24</sup> *Id.* at 89–90.

<sup>25</sup> LUBAN, *LAWYERS AND JUSTICE*, *supra* note 20, at 127.

<sup>26</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 70.

<sup>27</sup> LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 12.

<sup>28</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 159–60.

<sup>29</sup> DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 104 [hereinafter LUBAN, *Natural Law*] (arguing that when Fuller "insists that there is a morality to law," he means that "lawmaking is a profession with a distinctive professional ethics").

<sup>30</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 70.

I am largely in agreement with Luban's account of human dignity. I would like to see him harmonize this account with his emerging jurisprudence of lawyering by requiring attention to a client's unique set of passions, cares, commitments, and relationships to play a prominent role in the larger jurisprudential project of mediating between the client's interests and the law. However, to do so would require him to move away from the perspective of lawyers as "lawmakers" that he finds at the heart of Fuller's jurisprudence of lawyering—and with which he is dissatisfied for other reasons—and contemplate the value and legitimacy of a lawyers' partisan interpretation of the law in transactional as well as litigation settings.

## I

### HUMAN DIGNITY AND CLIENT STORYTELLING

Luban suggests that "what makes the practice of law worthwhile is upholding human dignity" and that "adversarial excesses are wrong precisely when they assault human dignity instead of upholding it."<sup>31</sup> He finds a relational explanation of human dignity to be most compelling, formed by the interaction between a dignifier and the dignified.<sup>32</sup> Having human dignity means "having a story of one's own"—it is having a subjective view of the world in which one is at the center.<sup>33</sup> This subjectivity includes persons' "perceptions, their passions and sufferings, their reflections, their relationships and commitments, what they care about."<sup>34</sup>

To honor human dignity is to presume that each person has a story to tell and to take each person's cares and commitments seriously. To deny someone's human dignity is to "treat[ ] her story as if it didn't exist, her point of view as if it were literally beneath contempt."<sup>35</sup> Lawyers dignify their clients by giving voice to their clients: by "telling the client's story and interpreting the law from the client's viewpoint";<sup>36</sup> and "by giving the client voice and sparing the client the humiliation of being silenced and ignored."<sup>37</sup> Even if a person's story is implausible or ultimately unsympathetic, the legal system dignifies those who are subject to the law's reach by hearing stories told from their point of view—stories in which they are the protagonists. At the heart of Luban's analysis of what it means to uphold a client's human dignity is a vision of partisan advocacy in which lawyers strive to match the case theory the lawyer presents—the legal story the lawyer tells

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<sup>31</sup> *Id.* at 66.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 70–71.

<sup>34</sup> *Id.* at 76.

<sup>35</sup> *Id.* at 69.

<sup>36</sup> *Id.* at 70.

<sup>37</sup> *Id.* at 72.

about a client in negotiation or litigation—with the cares, commitments, and concerns that are most central to the client.<sup>38</sup>

The ideal of partisan advocacy Luban sketches in his human dignity essay is strikingly different from the morally neutral partisanship he famously critiqued in his essay, *The Adversary System Excuse*, which has been revised for *Legal Ethics and Human Dignity*. Luban is perhaps best known for his argument that lawyers' partisan behavior must be morally justified by arguments that the behavior is required by the advocate's role in the adversary system and that the adversary system is itself morally justified.<sup>39</sup> Rather than relying on blanket appeals to the "adversary system excuse" to justify their behavior, Luban argued that lawyers should take into account the moral justifications for their adversarial role and weigh the strength of those justifications against the moral harm that adhering to the role would cause.<sup>40</sup> Luban's alternative ideal of professionalism—which he called moral activism—imposes on lawyers the moral responsibility to "break role" in compelling moral circumstances to respond to the human pathos of those on whom harm would be visited as a result of adhering to professional role obligations.<sup>41</sup>

Just how compelling the circumstances have to be depends on how strongly justified the lawyer's partisan role is in the first place. Where a lawyer represents an individual squaring off against the state or a powerful institution—the paradigmatic example is criminal defense—Luban argued that the moral justifications for the adversary system are strong and typically require "the kind of partisan zeal characterized in the standard conception."<sup>42</sup> In representing clients with greater or roughly equal power to their opponents, however, the adversary system is only weakly justified by a pragmatic argument that it "seems to do as good a job as any at finding truth and protecting legal rights," and because it is the system already in place.<sup>43</sup> Because the

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<sup>38</sup> For an elaboration of this view of case theory development, see Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994).

<sup>39</sup> LUBAN, *LAWYERS AND JUSTICE*, *supra* note 20, at 133–37.

<sup>40</sup> This weighing involves a four-step process, which is explained in detail in LUBAN, *LAWYERS AND JUSTICE*, *supra* note 20, at 128–47.

<sup>41</sup> See David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 451–52 (1990) (resolving an ambiguity in his original formulation by clarifying that the duty to "break role" in compelling moral circumstances captured the truest essence of his alternative ideal of moral activism).

<sup>42</sup> LUBAN, *LAWYERS AND JUSTICE*, *supra* note 20, at 148.

<sup>43</sup> *Id.* at 92. Luban suggested that lawyers in civil cases should be enjoined from deceitful practices and from inflicting "morally unjustifiable damage on other people." *Id.* at 157. Additionally, they may not take exception from the general moral obligation of obedience to the law by manipulating the law "to achieve outcomes that negate its generality or violate its spirit." *Id.* They also may not pursue legally permissible but "substantively unjust results." *Id.*



adversary system is so weakly justified in such cases, he concluded, it “doesn’t excuse more than the most minor deviations from common morality.”<sup>44</sup>

The version of partisanship that Luban critiques in *The Adversary System Excuse* is a stark and unfettered type of advocacy he labels “zeal at the margin of the legal.”<sup>45</sup> In this type of advocacy, lawyers push their clients’ claims “to the limit of the law and then a bit further, into the realm of what is ‘colorably’ the limit of the law.”<sup>46</sup> This picture of partisanship implicitly assumes that clients desire lawyers to push their legal claims up to and a bit past the limits of the law. “Zeal at the margin” does not require lawyers to understand or even inquire into their clients’ unique cares, concerns, commitments, or values, which lay at the heart of Luban’s human dignity analysis. Lawyers pursuing “zeal at the margin” concern themselves primarily with maximizing their clients’ legal rights and interests.

While Luban’s critiques of the adversary system are effective against a vision of “zeal at the margin,” they do not stand up as well against the richer version of partisanship suggested by his human dignity framework. Luban’s critique of the adversary system’s efficacy in arriving at the truth illustrates this point. Luban argues that “zeal at the margin” cannot possibly be the best way to arrive at truth—at least not where issues of fact are involved.<sup>47</sup> In a departure from his earlier views, Luban now concedes that adversarial contest may be the best way to ferret out the strongest legal arguments.<sup>48</sup> However, adversarial contest is effective here because the decision maker has independent access to relevant information about the law and “only the arguments and counter-arguments remain.”<sup>49</sup> As Luban points out, adversarial contest provides the “kind of give and take that critical rationalists favor”<sup>50</sup> and thus approximates the scientific method of “‘examining and testing propositions or theories by attempting to refute them.’”<sup>51</sup>

When it comes to fact-finding, Luban argues, the analogy to the scientific method unravels. Litigators “view one of their main jobs as keeping damaging information out of the record.”<sup>52</sup> In Luban’s portrait of “zeal at the margin,” the lawyer’s objective is to “win” regard-

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<sup>44</sup> *Id.* at 149.

<sup>45</sup> LUBAN, *Adversary System Excuse*, *supra* note 11, at 26.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 32–40.

<sup>48</sup> *Id.* at 34–35.

<sup>49</sup> *Id.* at 34.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (quoting KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 352 (1963)).

<sup>52</sup> *Id.* at 35.

less of the cost to truth. Hence, zealous lawyers will engage in all kinds of obfuscation and distortion in the way they present evidence to a fact-finder or prevent the fact-finder from ever discovering the evidence. Under this description, adversarial partisanship sounds like a bad bet for the rationalist search for truth in which propositions are advanced and refuted until the strongest one holds.

However, Luban's human dignity framework provides both a different motivation for controlling the flow of information and a different definition of what is going on in litigation advocacy. Under his human dignity framework, a lawyer controls the flow of information as a storyteller in an effort to tell *the client's* story.<sup>53</sup> Storytelling necessarily involves the careful selection and ordering of fact. A lawyer seeking to tell a client's story will shape the facts in ways that animate the client's perspective on events: emphasizing facts that paint the client as a protagonist, minimizing facts that cast the client in a bad light, and hammering on the credibility of witnesses who dispute the client's version of events. All of these techniques of advocacy are ways to make the client's version of the truth both logically plausible and emotionally compelling—to invite the fact-finder to identify with the client and to see the world the way the client sees it. Within a storytelling model, partisan advocacy is not a scientific search for the truth through the presentation of competing arguments, but instead is a process of finding the story that best persuades the fact-finder to identify with one party and to respond with interpretations of law that honor that client's perspective on whatever trouble is at the heart of the litigation.<sup>54</sup>

The idea that litigation is a quest for the hearts of jurors and not just an appeal to their minds is integral to much of the law governing the admissibility of evidence. In *Old Chief v. United States*,<sup>55</sup> the Supreme Court noted that evidence "has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict."<sup>56</sup> *Old Chief* is the leading Supreme Court case on applying the balancing test under Federal Rule of Evidence 403 (Rule 403),<sup>57</sup> which weighs the "probative value" of evidence against the risk of "unfair prejudice" resulting from the evi-

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<sup>53</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 69–70.

<sup>54</sup> See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000) (focusing on three processes of legal thought and practice: categorizing, storytelling, and persuasion).

<sup>55</sup> 519 U.S. 172 (1997).

<sup>56</sup> *Id.* at 187.

<sup>57</sup> Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*, 20 AM. J. TRIAL ADVOC. 563, 566 (1997).

dence's admission.<sup>58</sup> Rule 403 exemplifies an attempt in the law of evidence to control the emotional impact of facts on jury decision making by declaring certain kinds of emotionally inflammatory evidence inadmissible.<sup>59</sup> This body of law does not exclude such evidence because it is irrelevant to the search for the truth, but rather because it creates the danger that a jury will overweigh its probative value, draw impermissible inferences that can never be fully counteracted with limiting instructions, or punish a litigant for the wrong reasons.<sup>60</sup>

The idea that not all relevant evidence should be included in the "search for truth" underlies one of Luban's own examples of overzealous partisanship. In *The Adversary System Excuse*, he criticizes attempts by corporate attorneys to defend a product liability suit by questioning users of the Dalkon Shield about their personal hygiene and sexual practices.<sup>61</sup> While these questions are broadly relevant to the search for the truth about whether a particular user may have contracted pelvic inflammatory disease from a source other than the company's birth control device, Luban sees them as an intimidation tactic designed to discourage litigants from pursuing their claims.<sup>62</sup>

I suspect that the aggressive questioning of Dalkon Shield plaintiffs is a salient issue for Luban for some of the same reasons he has been consistently troubled by the aggressive cross-examination of complainants in rape cases: because it exemplifies the use of the legal system to perpetuate oppressive patterns of patriarchal sexism. This, I think, turns out to be an important point. If "adversarial excesses are wrong precisely when they assault human dignity instead of upholding it,"<sup>63</sup> then situations in which an adversarial practice upholds the human dignity of one person at the expense of the human dignity of another raise the most difficult cases for Luban's human dignity framework. The question of how aggressively criminal defense attorneys may cross-examine complainants in rape cases raises this tension for Luban in a particularly acute way.

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<sup>58</sup> See FED. R. EVID. 403.

<sup>59</sup> 2 WEINSTEIN'S FEDERAL EVIDENCE § 403.02[1][a], at 403-6 to -7, (Joseph M. McLaughlin ed., 2d ed. 2007).

<sup>60</sup> See *id.* This concern is also the source of the rule against propensity evidence. See *id.* § 404.10[1], at 404-12.1.

<sup>61</sup> LUBAN, *Adversary System Excuse*, *supra* note 11, at 35-36.

<sup>62</sup> *Id.*

<sup>63</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 66.

## II

BRUTAL CROSS-EXAMINATION AND THE HUMAN  
DIGNITY FRAMEWORK

Although Luban has always seen it as a close question, he initially argued that lawyers should refuse to cross-examine a complaining witness in a rape case in ways that made her “look like a whore.”<sup>64</sup> In his original treatment of the issue, he maintained that it was unethical for criminal defense lawyers to humiliate complaining witnesses in rape cases through brutal cross-examination, *even in cases where the complaining witness was lying*.<sup>65</sup> This conclusion turned out to be too strong for his theory, and he later partially backed away from it.<sup>66</sup> An analysis of his evolving views on the subject helps to illustrate how the human dignity framework helps explain both his original position and his change of heart.

Luban’s original conclusion—that criminal defense lawyers are not justified in brutally cross-examining even a false accuser in a rape case to uncover her lie—resulted from his analysis of an institutional clash between the role of criminal defense lawyers and the protection of rape complainants against institutionalized patriarchy. He noted that individual rape victims have a moral claim to protection against deeply embedded sexism in the law and legal institutions and that “the right of women to invoke the state’s aid against rapists without fear of humiliation does not diminish when a wom[a]n abuses it by making a false accusation.”<sup>67</sup> Because the moral justification for the criminal defense lawyer’s institutional role is indifferent to guilt or innocence, he concluded, the innocence or guilt of an individual client has no role in a defense attorney’s moral calculus.<sup>68</sup>

Luban later partially backed away from this claim by differentiating between two types of rape cases in which defendants could claim innocence. He conceded that when a complaining witness has *wholly fabricated* a rape allegation, the humiliating cross-examination is morally defensible.<sup>69</sup> However, he maintained that if a client’s claim of innocence was based on the fact that the client *thought* the complaining witness had consented—even though she did not actually assent to having sex—the criminal defense lawyer’s moral sympathies should be with the complaining witnesses, not the client.<sup>70</sup> In the latter, “date-rape” case, the lawyer should break role and hold off on a

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<sup>64</sup> LUBAN, *LAWYERS AND JUSTICE*, *supra* note 20, at 150–52.

<sup>65</sup> *Id.* at 151–52.

<sup>66</sup> Luban, *Lawyer-Client Relationship*, *supra* note 20, at 1006, 1026–35.

<sup>67</sup> LUBAN, *LAWYERS AND JUSTICE*, *supra* note 20, at 152.

<sup>68</sup> *Id.* at 151–52.

<sup>69</sup> Luban, *Lawyer-Client Relationship*, *supra* note 20, at 1032–35.

<sup>70</sup> *Id.*

brutal cross-examination that would detail the facts leading up to the sexual encounter in a way that would make a mockery of the complaining witness's claim of non-consent.<sup>71</sup>

Luban's human dignity framework makes sense out of his insistence that the brutal cross-examination of a truthful complainant is generally wrong, as well as his partial concession that such cross-examination is justified when the complainant is actually lying. In both instances, the tangible harm of assaulting the human dignity of a particular individual is set up against the more abstract institutionalized protection of the human dignity of the other. In Luban's terms, in each instance the circumstances are compelling enough to justify the lawyer's decision to break role. However, Luban's human dignity framework does not support his answer in the date-rape case because it provides no way to make judgments of relative worth when honoring the subjective experience of one person goes head-to-head with denying the subjective experience of another.

To understand the brutal cross-examination issue within Luban's human dignity framework, it is important to take note that Luban's moral activist duty to break role under compelling circumstances has always been grounded in the same relational morality that animates his human dignity framework. In *Lawyers and Justice*, Luban called the duty to break role the "morality of acknowledgment" and described it as the ability to adopt the point of view of the person affected by the lawyer's actions.<sup>72</sup> For Luban, lawyers' ability to break role and respond to the call of ordinary moral obligation is what keeps the institutions of society from degenerating into a "Kafkaesque nightmare . . . in which the functionaries occupying society's stations indifferently go about their business regardless of the plight we are in."<sup>73</sup> The bureaucratization of professional duty without thought for its underlying rationale treats those who are subjected to legal processes as if their uniqueness—their subjectivity—does not matter. The bureaucratization of legal professionalism is the most basic kind of evil at which Luban's "moral activism" was initially directed.<sup>74</sup>

It is also important to understand that, for Luban, there are two levels at which the legal process upholds the human dignity of criminal defendants. At the individual level, the legal process upholds human dignity by allowing the criminal defendant to tell his own story.<sup>75</sup> At the institutional level, the legal process upholds a criminal

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<sup>71</sup> *Id.*

<sup>72</sup> LUBAN, *LAWYERS AND JUSTICE*, *supra* note 20, at 126–27.

<sup>73</sup> *Id.* at 126.

<sup>74</sup> Luban has also based his moral activism in a vision of lawyers as mediators between client interests and the public good, drawing on what he calls a "noblesse oblige" tradition in legal ethics. See generally Luban, *Noblesse Oblige Tradition*, *supra* note 20.

<sup>75</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 68–72.

defendant's human dignity by allowing him to remain silent—to put the state to its proof of guilt beyond a reasonable doubt—and to argue any inferences that are consistent with innocence, even if the defendant (and his lawyer) know that these inferences are in fact false.<sup>76</sup> Luban sees the institutional protection of criminal defendants' dignity as justified because a criminal conviction carries society's moral condemnation in a way that civil liability does not.<sup>77</sup> He also points out that, unlike in the civil context, in which a benefit to one party causes a direct harm to the opposing party, an acquittal in a criminal case "inflicts no tangible harm on anyone."<sup>78</sup>

Luban argues that criminal defense lawyers are excepted from the general constraints on advocacy under the human dignity framework. Under the human dignity framework, partisan advocates are justified in presenting the facts persuasively from the client's point of view, but not justified in distorting the facts to construct a story that is not really the client's story but that serves the client's legal interests.<sup>79</sup> Criminal defense lawyers are justified in deviating from the more general storytelling rationale for partisan advocacy by presenting a false defense because the presumption of innocence in criminal cases is one of the ways in which society institutionalizes respect for the human dignity of those subject to its laws.<sup>80</sup>

What Luban calls the brutal cross-examination of rape victims is also a violation of their human dignity at two interconnected levels. By a "brutal cross-examination" he means questioning the complainant in a way that "characterize[s] every detail vividly from the most salacious point of view attainable and present[s] it all with maximum innuendo" so as to "play to the jurors' deeply rooted cultural fantasies about feminine sexual veracity and vengefulness."<sup>81</sup> To invoke such stereotypes in an attempt to persuade a fact-finder to disbelieve the story of a rape victim not only affronts the human dignity of the witness by silencing her voice; it also violates the collective human dignity

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<sup>76</sup> *Id.* at 72–73. To illustrate this point, Luban uses William Simon's example of a lawyer defending a man accused of possessing a stolen television set. *Id.* at 72. The man was caught putting the television set in the back seat of his car. The lawyer uses the fact that the man put the television set in the back seat rather than the trunk of his car to raise the inference that the defendant lacked knowledge that the television set was stolen. However, the defense attorney knows full well that the defendant did not have a key to the trunk of the car. Based on facts known to the defense attorney but not the fact-finder, the inference is false. *Id.*

<sup>77</sup> *Id.* at 73.

<sup>78</sup> LUBAN, *Adversary System Excuse*, *supra* note 11, at 30.

<sup>79</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 69–70.

<sup>80</sup> *Id.* at 72–73.

<sup>81</sup> Luban, *Lawyer-Client Relationship*, *supra* note 20, at 1028.

of women by perpetuating a pervasive and institutional silencing of the perspectives of women in the law.<sup>82</sup>

If we understand that the protection of human dignity is occurring at two levels in each case—an individual level and an institutional level—then we can see how the human dignity framework would produce the results on which Luban eventually settles. If a criminal defendant knew at the time of a sexual encounter that he was forcing the complaining witness to have sex with him against her will and tells his lawyer as much, the lawyer's cross-examination does not tell the defendant's story at all. Rather, the line of brutal cross-examination falls into the institutional exception in criminal cases that allows criminal defense lawyers to tempt the fact-finder to draw a false inference—one that is consistent with the presumption of innocence but contradicted by the facts as the lawyer knows them. Luban argues that presenting a false defense in criminal cases is generally allowed because it causes no tangible harm to third parties to allow a guilty man to go free.<sup>83</sup> However, the brutal cross-examination of the complaining witness causes a tangible harm by silencing her voice and assaulting her human dignity.

However, if the criminal defendant really is being falsely accused, it would be an assault on his human dignity for his advocate to deliberately sit by and allow him to suffer the consequences of a wrongful conviction by declining to use the tools of adversarial confrontation to uncover the factual weaknesses in the accusations against him. To decline to use the line of brutal cross-examination would protect the institutional structures that create the opportunity for women's stories to be told and heard in rape cases generally. But it would also subordinate the wrongfully accused defendant's uniqueness to the more impersonal goal of combating institutionalized sexism and patriarchy.

When viewed within Luban's human dignity framework, lawyers contemplating cross-examining a truthful rape complainant to present a false defense and lawyers contemplating failing to brutally cross-examine a lying rape complainant face a moral dilemma with a similar analytical structure. In each case, the lawyers must choose between a course of action that assaults the human dignity of an individual by effectively silencing his or her voice and a course of action that upholds an institutional protection of human dignity for a class of persons. In each case, the justifications for institutionally protecting the human dignity of a class of persons apply only weakly. Under the mo-

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<sup>82</sup> Luban uses the problem of the institutionalized exclusion of women's voices to illustrate the limitations of Lon Fuller's jurisprudence as a jurisprudence of lawyering. LUBAN, *Natural Law*, *supra* note 29, at 127–28.

<sup>83</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 73.

rality of acknowledgment at the core of Luban's moral activism, it is time in each case for the lawyer to break role and respond to the human pathos of the individual who would be harmed by the lawyer's choice.<sup>84</sup>

The lawyer who presents a false defense of consent and the lawyer who declines to vigorously defend the wrongfully accused rape client are in many ways the easy cases for Luban's human dignity framework. The harder case is the date rape scenario: a man accused of rape who insists that he thought the complaining witness really did consent to a sexual encounter with him, although in fact she did not want to have sex. Luban concludes that in such a case, the lawyer would not be justified in conducting a brutal cross-examination.<sup>85</sup> He concludes that the lawyer "can ask the victim whether she consented, and can then argue reasonable doubt," but it crosses the line for the lawyer to "try to convince the jury that as a factual matter the prosecutrix's behavior was tantamount to consent."<sup>86</sup>

Like most hard cases, the date-rape scenario runs the risk of making bad law, and Luban's resolution of the case has done just that. What characterizes the date-rape situation is that the client and the complaining witnesses have different subjective experiences of the same event; they would largely agree about the facts but would tell the story about consent from different perspectives.<sup>87</sup> The question of guilt or innocence in a case like this is not really a question of whose story is "true," but whose perspective on what happened—the defendant's or the complainant's—the law should honor.<sup>88</sup> Luban concludes that the defense attorney would not be justified in engaging this line of cross-examination because in such a case the defendant's behavior "was really a rape."<sup>89</sup> As Luban points out,

You can drink and flirt and tell dirty jokes without agreeing to have sex. You can dress any way you wish without agreeing to have sex. You can accept a ride with a man and have him into your home without agreeing to have sex. And you can decide not to resist a sexual attack by a man who scares you without agreeing to have sex.<sup>90</sup>

To construe the complainant's behavior as consent, Luban tells us,

[I]s tantamount to adopting the viewpoint of a 19 year-old male out on a steamy Saturday night. At bottom he is completely uninterested in whether the woman he meets *wants* to have sex with him;

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<sup>84</sup> LUBAN, *LAWYERS AND JUSTICE*, *supra* note 20, at 126–27.

<sup>85</sup> Luban, *Lawyer-Client Relationship*, *supra* note 20, at 1032–33.

<sup>86</sup> *Id.* at 1033.

<sup>87</sup> *Id.* at 1033–34.

<sup>88</sup> *See id.*

<sup>89</sup> *Id.* at 1033.

<sup>90</sup> *Id.*



he is interested only in whether she *will* have sex with him. . . . Like a hawkeyed auctioneer, he spots the slightest signal that might mean yes.<sup>91</sup>

In providing this answer, Luban takes sides by choosing to honor the complaining witness's story rather than the defendant's story. The defendant's story—the story in which he is a protagonist—really is the story of a 19 year-old male out on a steamy Saturday night. It is not possible to animate the defendant's story with the details that bring his perspective of events to life without engaging in what Luban would call a brutal cross-examination that dwells on the details of the complainant's behavior and encourages the jury to view that behavior from the defendant's point of view. The bottom line is that Luban does not believe the defendant's story is worthy of being told. His answer treats the client's version of the story "as if it didn't exist" and the client's point of view "as if it were literally beneath contempt."<sup>92</sup>

Luban's human dignity framework cannot support this answer, however, because it allows no way to make judgments of relative worth when faced with a trade-off between dignifying one person at the expense of humiliating another. Luban briefly mentions a distinction between being "humbled" and being "humiliated," which might give him material for judgments of relative worth.<sup>93</sup> "Dignity," he points out, "goes with rank; an indignity occurs when someone is treated below their rank."<sup>94</sup> Being "humbled" is being "*rightly* taken down a peg."<sup>95</sup> Being humiliated is being "*wrongly* taken down a peg."<sup>96</sup> One might use this distinction to argue that the proper response to some people's stories is to silence them; some stories are more worthy of being told than others. However, Luban sets the stakes of disregarding another's subjectivity too high for the distinction between being humbled and humiliated to do that kind of work. Within his framework, "[e]veryone is a subject, everyone's story is as meaningful to her or to him as everyone else's, and everyone's deep commitments are central to their personality."<sup>97</sup> To treat someone's story as unworthy of being told inflicts the humiliation of treating them as less than fully human.<sup>98</sup>

The relational morality at the heart of Luban's human dignity framework problematically creates an intractable dilemma when one person's story competes head-on with that of another: the law cannot

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<sup>91</sup> *Id.* at 1035.

<sup>92</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 68–69.

<sup>93</sup> *Id.* at 89.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 90.

recognize and honor one story without silencing and dismissing the other.<sup>99</sup> Of course, an advocate does not need to choose which story to honor because the advocate has been given a particular task: to tell the *client's* version of the story in the most effective way possible. The human dignity framework justifies the criminal defense lawyer in telling her client's story in the date-rape case because it is her role within the larger system to do so. But the human dignity framework does not provide the escape hatch that Luban requires to justify the criminal defense lawyer in abandoning the responsibility of telling the client's story to honor the human dignity of the complainant on the witness stand. The human dignity framework does not provide a way for the advocate to break role in the hard case.

### III

#### INTERPRETING THE LAW FROM THE CLIENT'S POINT OF VIEW

Although the relational morality at the heart of the human dignity framework does not provide a solid enough basis to break role in the hard cases, it also is not the only way to justify a lawyer in declining to tell her client's story in full and animated detail. One can also understand Luban's answer in the date rape case as a legal point: the law itself places limits on the kind of stories that the lawyer can tell.<sup>100</sup> Specifically, the lawyer may not be able to tell the client's story because the client's behavior "was really a rape."<sup>101</sup> To tempt the jury to acquit a defendant in the date rape case by appealing to sexist attitudes that the law has ruled out of bounds violates the lawyer's duties of interpretive fidelity to the law.<sup>102</sup>

The legal answer draws on the central argument in Luban's jurisprudence of lawyering: the representation choices lawyers make in

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<sup>99</sup> See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2109 (1989) ("‘Law’ . . . cannot ‘empathize’ with everyone equally. All stories cannot be given equal value. To do so would deny the ordering of interests inherent to law.”).

<sup>100</sup> See LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 70. For example, lawyers are prohibited from making false statements of fact or law to a court. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

<sup>101</sup> Luban, *Lawyer-Client Relationship*, *supra* note 20, at 1033.

<sup>102</sup> This answer is problematic in the criminal law context because of the jury's historic power of nullification. The human dignity of criminal defendants receives extra protection by giving the jury the power to acquit on equitable grounds, even if the evidence clearly establishes a criminal violation under the law. See WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 22.1(g) (4th ed. 2004). Setting the power of jury nullification aside, however, the answer that the lawyer should mute the client's story out of respect for the law is problematic on terms that transcend the criminal law context and transcend the litigation context as well.

their day-to-day work define law at its lowest levels.<sup>103</sup> If we view law the way Luban asks us to view it—as a mosaic in which every interaction between a lawyer and a citizen lays down a new tile<sup>104</sup>—then the lawyer who engages in brutal cross-examination creates and sustains patriarchal law with each such cross-examination that he or she conducts.

I think the law does provide limits on lawyers' advocacy for the reasons that Luban suggests about the importance of low-level decision making to the overall legitimacy of law as a structure of governance. However, to draw those limits properly requires us to define the jurisprudential stance from which lawyers ought to interpret the law. As Luban points out, the field of jurisprudence has been dominated by the task of adjudication, not representation.<sup>105</sup> Although there has been some recent notable work in legal ethics on jurisprudential theory, the field is still fairly new and ripe for further development.<sup>106</sup> Luban's human dignity framework has the potential to add to this debate, but in ways that he does not develop.

To understand the jurisprudential potential of Luban's human dignity framework, it is helpful to contrast it with Luban's analysis of Lon Fuller's jurisprudence as legal ethics, which is included as a chapter in this book.<sup>107</sup> Luban argues that Fuller always meant his jurisprudence to apply to lawyers in their day-to-day work of advising clients about the law and structuring transactions between private parties.<sup>108</sup> The key to understanding Fuller's jurisprudence, Luban argues, is Fuller's proposition that "the word 'law' means the life work of the lawyer," and the life work of the lawyer is the task of "reducing the relations of men to a reasoned harmony."<sup>109</sup> In their day-to-day work, lawyers engage directly in "the enterprise of subjecting human conduct to the governance of rules."<sup>110</sup> Lawyers thus share the title

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<sup>103</sup> See generally LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 65–95 (describing the lawyer's role in preserving human dignity and focusing on the choices that lawyers make).

<sup>104</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 152.

<sup>105</sup> See LUBAN, *Adversary System Excuse*, *supra* note 11, at 27–28.

<sup>106</sup> See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 39 (1998) (applying Ronald Dworkin's jurisprudence to legal ethics); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) (discussing limits on the lawyer's responsibility to provide a client with legal knowledge that may assist the client's attempts to violate the law); W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 382–83 (2004) (arguing that the law's legitimacy depends on it receiving respect).

<sup>107</sup> See LUBAN, *Natural Law*, *supra* note 29, at 99–130.

<sup>108</sup> See *id.* at 104.

<sup>109</sup> *Id.* at 103 (quoting LON FULLER, *THE LAW IN QUEST OF ITSELF* 3 (photo. reprint 1965) (1940)).

<sup>110</sup> *Id.* at 102 (quoting LON FULLER, *THE MORALITY OF LAW* 106 (1969)).

"lawmaker" with legislators.<sup>111</sup> As lawmakers, lawyers are constrained by the interpretive principles of legality arising from Fuller's internal morality of law, including generality, publicity, prospectivity, clarity, consistency, feasibility, constancy through time, and congruence between rules as announced and their later enforcement.<sup>112</sup>

However, in their role as lawmakers under Fuller's jurisprudence, lawyers would view the law from a perspective that is impersonal to the client's particular viewpoint or situation. As Luban points out, Fuller's canons of interpretation "impl[y] a certain impersonality in the relationship between governors and governed. . . . What matters is *what* we are and do, not *who* we are—our deeper identity remains outside law's purview."<sup>113</sup> Governing the conduct of others based on general and impersonal legal rules implies, according to Fuller, "a certain built-in respect for [the] human dignity" of the governed.<sup>114</sup>

The general and impersonal way in which Fuller's lawyers would respect their clients' human dignity through the rule of law is markedly different from the recognition of the unique subjectivity of persons at the heart of Luban's account of human dignity. Within the human dignity framework, Luban suggests, lawyers dignify their clients by "interpreting the law *from the client's viewpoint*."<sup>115</sup> Luban does not develop this idea into a comprehensive jurisprudential view. However, Luban's partisan-advocacy-based human dignity framework has promise as a foundation for the larger jurisprudential project of establishing and maintaining law's legitimacy in the low-level interactions that make up law's mosaic.

Luban himself seems skeptical of this proposition. Even within the litigation context in which he develops his human dignity framework, Luban rather quickly dismisses as impractical the ideal of partisan advocacy in which lawyers tell their clients' stories, taking a cynical view of what lawyers actually do and what clients actually want in litigation.<sup>116</sup> He points out that "advocates create their theories of the case and assemble the arguments and evidence without caring much whether their theory is the client's theory," and speculates that "[c]lients, for their part, generally won't have a theory of the case, and what interests them is the outcome, not the fidelity with which their lawyer represents their own version of reality."<sup>117</sup> Moreover, Luban voices skepticism that the partisan perspective of lawyers has much of

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<sup>111</sup> *Id.* at 104.

<sup>112</sup> *Id.* at 101.

<sup>113</sup> *Id.* at 111.

<sup>114</sup> *Id.* at 110 (quoting Lon L. Fuller, *A Reply to Professors Cohen and Dworkin*, 10 VILL. L. REV. 655, 665 (1965)).

<sup>115</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 70 (emphasis added).

<sup>116</sup> *See id.* at 69.

<sup>117</sup> *Id.*

value to offer a jurisprudence of lawyering. If anything, he views partisan advocacy as a corrupting influence on transactional lawyers who inappropriately “treat the advisor’s role like that of an advocate.”<sup>118</sup> He dismisses litigators’ perspectives on the law as “parasitic on the point of view of judges” and consequently inappropriate for the development of a jurisprudence specific to the task of lawyering.<sup>119</sup>

However, there is now a substantial body of procedural justice literature in the field of social psychology emphasizing the importance to clients of the “opportunity for voice.”<sup>120</sup> Studies suggest that parties’ satisfaction with the outcome of either litigation or alternative dispute resolution processes depends on whether they felt that their version of events was heard and taken into account by the decision maker.<sup>121</sup> If the procedural justice literature is correct, then the partisan role that Luban’s human dignity framework assigns to lawyers—hearing, understanding, and effectively telling the stories that capture their clients’ subjectivity in litigation<sup>122</sup>—may be crucial to the larger jurisprudential project of establishing law’s legitimacy.

This promise extends to the transactional context as well. In the transactional context, lawyers advise clients about how to structure their affairs and facilitate interactions among others within the context of legal constraints.<sup>123</sup> As Luban points out, in the transactional context, lawyers translate the law on the books into the law in action, and often do so within confidential settings where the lawyer’s interpretation of the law is the final word on the subject.<sup>124</sup> The privacy and finality of lawyers’ interpretations of the law within the transactional context might suggest that partisan interpretation of the law—interpreting the law from the client’s point of view—is inappropriate in transactional settings.<sup>125</sup>

Again, however, the Nightmare bogey of caricatured partisanship—“zeal at the margin”<sup>126</sup> in which lawyers “spin the law to support whatever the client wishes to do”<sup>127</sup>—must be contrasted with the richer and more nuanced vision of partisanship that Luban’s human dignity framework suggests. Luban’s framework provides a vivid ex-

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<sup>118</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 159.

<sup>119</sup> *Id.* at 131.

<sup>120</sup> See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 180–81 (1988).

<sup>121</sup> For a summary of these studies, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 817–30 (2001).

<sup>122</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 68–70.

<sup>123</sup> LUBAN, *Natural Law*, *supra* note 29, at 104.

<sup>124</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 131–32.

<sup>125</sup> See SIMON, *supra* note 106, at 146–47 (discussing legal decisions in the transactional context).

<sup>126</sup> LUBAN, *Adversary System Excuse*, *supra* note 11, at 26.

<sup>127</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 159.

ample of transactional "zeal at the margin" in his discussion of the so-called "torture memos" produced by the Office of Legal Counsel that "spun advice" about the legal limits on interrogation of enemy combatants.<sup>128</sup> A lawyer bent on "spin[ing] the law to support whatever the client wishes to do"<sup>129</sup> might proceed as Luban suggests the "torture lawyers of Washington" proceeded: take unrelated bits of law, read them out of context, manipulate the text to reach the result the client wants, and never ask "the most basic interpretive question" about the underlying purpose of the law in question.<sup>130</sup>

However, a transactional lawyer operating within Luban's human dignity framework would take a different kind of approach toward "interpreting the law from the client's viewpoint."<sup>131</sup> The lawyer trying to dignify the client tries not merely to reach the client's desired result, but to reach the result in a way that legitimates what the client wants to do by finding actual support within the law for doing it. Such a lawyer will look for portions of the law that recognize the client's view of the world and seek ways to extend the web of legal protection that characterize the "law in action" to best reflect the client's subjectively understood concerns. By beginning with the client's subjectivity and trying to find expression of that perspective within the law, lawyers more truly fulfill Luban's Noble Dream of being "independent intermediaries between private and public interests, translating client problems into the terms of the law, and presenting the law to the client in intelligible form."<sup>132</sup>

Luban is ultimately uncomfortable with Fuller's view of lawyers as lawmakers because he is unconvinced that fidelity to Fuller's principles of legality will assure that just laws will be enacted.<sup>133</sup> Luban's concern is with the "catastrophic asymmetry" between those benefited by law and those subject to its dictates.<sup>134</sup> Luban points out that the "law on the books" is most often created for the benefit of the "numerical or power majority in the community" and may exclude the perspectives and voices of those outside society's elite.<sup>135</sup> As Luban points out, "almost every regime that has ever existed has legislated expressly to *deny* the self-determining agency of women."<sup>136</sup> If Luban is right, then by bringing the impersonal stance of Fuller's principles of legality into their day-to-day interpretations of law, lawyers translate

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<sup>128</sup> LUBAN, *Torture Lawyers*, *supra* note 12, at 163–64.

<sup>129</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 159.

<sup>130</sup> See LUBAN, *Torture Lawyers*, *supra* note 12, at 189.

<sup>131</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 18, at 70.

<sup>132</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 159–60.

<sup>133</sup> LUBAN, *Natural Law*, *supra* note 29, at 126–27.

<sup>134</sup> *Id.* at 128.

<sup>135</sup> *Id.* at 129.

<sup>136</sup> *Id.* at 127.

the inequities in the law on the books into the mosaic created by the law in action.

Luban tends to want to correct the problems of injustice by going outside the framework of law and allowing lawyers' moral sentiments to guide them.<sup>137</sup> Legal interpretation simply cannot supply the appropriate answers, he argues, because "[l]aw just isn't that good."<sup>138</sup> However, the human dignity framework Luban presents—in which lawyers seek to hear their clients' voices and reconcile or incorporate their clients' perspectives into the law—is a more promising antidote to the problem he identifies.

In a previous article, I have used an example of a lesbian couple who approach a lawyer seeking to arrange their legal affairs to best approximate the legal protections of marriage in preparation for their anticipated conception or adoption of a child.<sup>139</sup> The adoption law in most states allows a couple to jointly adopt a child only if the couple is married—a legal status most states deny to same-sex couples.<sup>140</sup> To structure a lesbian couple's affairs to resemble a marriage requires a lawyer to creatively find legal support for the clients' goal of forming a same-sex union and parenting a child within it. As with much of law, the lawyer will be helped by the fact that family law is not univocal. As Vivian Hamilton has pointed out, the basic concepts in family law are supported by divergent philosophies that are in tension with one another—Biblical traditionalism on the one hand and liberal individualism on the other.<sup>141</sup> Hamilton argues that while Biblical traditionalism protects the maintenance of opposite-sex marital families, the tenets of individual liberalism support the expansion of family to include less traditional forms.<sup>142</sup> By plumbing the depths of the law, lawyers can often find places that allow excluded voices to be heard, and can—in their low-level structuring of human relations—create a mosaic of the law in action that is more responsive to those excluded voices than the law on the books.

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<sup>137</sup> David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 876 (1999) ("I now tend to believe that *no* form of reasoning, artificial or not, can bear the burden of discerning right from wrong in particular cases. We just aren't that smart. Luckily, we don't have to be, provided that our moral sentiments are in good working order.").

<sup>138</sup> *Id.* at 888. Luban echoes this sentiment in the conclusion of his essay on Fuller's ethics, arguing that Fuller's jurisprudence of lawyering is ultimately inadequate to combat the injustice inherent in the law because "lawyers aren't *that* good." LUBAN, *Natural Law*, *supra* note 29, at 130.

<sup>139</sup> Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 408–09 (2005).

<sup>140</sup> *See id.* at 410–11 nn.79–80.

<sup>141</sup> *See* Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 67–69 (2006).

<sup>142</sup> *See id.*

## CONCLUSION

Luban's vision of the Noble Dream is perhaps best exemplified in the description of his parents' solo-practitioner friend Cyril Gross, a Milwaukee attorney uncorrupted by either the organizational evil of big firm practice or the moral neutrality of adversarial ethics.<sup>143</sup> Luban emphasizes Gross's virtues as a civic leader: he "kept up with world news and knew what was going on in our city; that made him a welcome guest for my civic-minded and intellectually inclined father."<sup>144</sup> But Cyril Gross also knew his clients—he "lunched at Benjy's Delicatessen to shoot the breeze[ ] over corned beef sandwiches" with them—and understood their world of small business because he was a small business person himself.<sup>145</sup> It is this second characteristic of Cyril Gross's practice—his ability to enter his clients' world and see the law from their perspective—that allows him to fulfill a role crucial to the law's legitimacy in the low-level, day-to-day interactions in which the "lawyer and client together [lay] down a tile in the social mosaic that makes up the law in action."<sup>146</sup>

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<sup>143</sup> LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 2, at 1.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 152.



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